87-661

Supreme Court, U.S.
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No. ___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

NORTHWOOD NURSING AND CONVALESCENT HOME, INC.,

Appellant

v.

CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES,

Appellee

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether an ordinance of the City of Philadelphia that sets a 60-day limit on applications for real estate tax exemptions without giving notice to taxpayers violates the Due Process Clause.

2. Whether a decision by the City of Philadelphia to grant to another taxpayer in the same position as appellant the tax exemption denied to appellant violates the Equal Protection Clause.

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v.

CITY OF PHILADELPHIA,
BOARD OF REVISION OF TAXES,

Appellee

**ON APPEAL FROM THE
COMMONWEALTH COURT OF PENNSYLVANIA**

JURISDICTIONAL STATEMENT

Appellant Northwood Nursing and Convalescent Home, Inc., appeals from the judgment of the Commonwealth Court of Pennsylvania entered on June 27, 1986.

OPINIONS BELOW

The decision of the Commonwealth Court of Pennsylvania was published at 511 A.2d 281 (Pa. Cmwlth. 1986) and is reprinted at p. A-1 of the Appendix. The decision of the Philadelphia Court of Common Pleas is reprinted at p. A-8 of the Appendix. It was not published.

JURISDICTION

The Commonwealth Court of Pennsylvania affirmed the denial of appellant's petition for leave to file an application for exemption *nunc pro tunc* on June 27, 1986. Appellant's petition for allowance of appeal to the Supreme Court of Pennsylvania was denied on January 24, 1987, and its application for reconsideration was denied on June 26, 1987. This jurisdictional statement is filed within 90 days of the denial of the application for reconsideration. This court's jurisdiction is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

U.S. Constitution Amendment XIV §1 (App. A-17), Pa. Const. Art. VIII §2(b)(iii) (Purdon 1969 and Supp. 1987) (App. A-17), 72 P.S. §4722 *et seq.* (Purdon Supp. 1987) (App. A-17), Bill No. 1130 (App. A-21), Phila. Code §19-1303(3) (App. A-25), and Bill No. 1744-A (App. A-28).

STATEMENT OF THE CASE

Appellant Northwood Nursing and Convalescent Home, Inc., (hereinafter "appellant" or "Northwood") owns and operates the Northwood Nursing Home, a nursing care facility. In 1983, Northwood made plans to construct an 82-bed addition to the facility. The Pennsylvania Constitution permits the legislature to establish standards by which local taxing authorities can permit property tax abatement or other relief for improvements of properties in deteriorated areas. Pa. Const. Art. VIII §2(b)(iii). The Pennsylvania Legislature implemented the constitutional provision in the Local Economic Revitalization Tax Assistance Tax of 1977, 72 P.S. §4722 *et seq.* The Act sets forth the procedure for obtaining the exemption:

> Any person desiring tax exemption pursuant to ordinances or resolutions adopted pursuant to this act, shall notify each local taxing authority granting such exemption

> in writing on a form provided by it submitted at the time he secures the building permit . . .

Id. §4727(a).

On February 8, 1978, the Mayor approved an ordinance passed by the Philadelphia City Council which declared that all areas of the city were deteriorated areas and that construction in those areas were eligible for a 5-year tax abatement under the Act. Bill No. 1130, Phila. Code §19-1303(3)(B). The ordinance established a procedure for obtaining an exemption:

> At the time a building permit for the construction of an improvement is applied for, the Department of Licenses and Inspection shall notify the applicant by a printed notice of the possibility of a tax exemption under this bill. When the building permit is issued, the taxpayer shall apply to the Board of Revision of Taxes for such exemption. The application shall be in writing upon forms prescribed by the Board of Revision of Taxes.

Phila. Code §19-1303(3)(D)(3)(a).

On June 10, 1983, Northwood's architect applied to the Department of Licenses and Inspection of the City of Philadelphia ("L&I" or "the Department") for a building permit to construct the addition. The Department did not provide either the architect or Northwood with an application form or notice of exemption. On July 12, 1983, the initial building permit was issued by L&I to Northwood's contractor. At the bottom right-hand corner of the building permit in small print appears the following:

> Information for exemption from real estate taxes on improvements to properties may be obtained by contacting the Board of Revision of Taxes, Room 303, City Hall Annex, Philadelphia, PA 19107 MU6-4340.

The notice did not mention a time limit for applications. Moreover, this was the only notice given to anyone connected with Northwood of the exemption. The permit was not provided to the taxpayer nor posted at the site. In the interim, on July 11, 1983, the Philadelphia City Council amended the ordinance by

adding a requirement that the application for exemption be filed within 60 days of the receipt of the building permit. Bill No. 1744-A. The amended ordinance did not provide for any notice or grace period, and, in fact, went into effect as of July 1, 1983.

On or about October 11, 1984, the taxpayer, by its corporate parent, Nursecare Health Centers, Inc. ("Nursecare, Inc.") filed with the City of Philadelphia, Board of Revision of Taxes (the "Board") an "Application for Exemption from Real Estate Taxes on Improvements to Industrial, Commercial or Other Business Property," in connection with the construction of the addition to Northwood Nursing Home. On or about February 1, 1985, Northwood, through Nursecare, Inc., received a letter from the Board, dated January 25, 1985, advising Northwood that its application had not been accepted for processing because it had not been filed within the sixty-day period specified in Phila. Code §19-1303(3).

HOW THE FEDERAL QUESTIONS WERE RAISED

On or about March 22, 1985, Northwood filed a Petition for Review and Petition for Leave to File Application Nunc Pro Tunc with the Court of Common Pleas of Philadelphia County. An Amended Petition for Review and Petition for Leave to File Application Nunc Pro Tunc was filed on April 10, 1985 with the consent of the City of Philadelphia. The unconstitutionality of the ordinance was raised in paragraphs 22 and 24 of the amended petition.

> 22. . . . The imposition of a 60-day time limit on a taxpayer, when combined with a notice requirement to some other party, is unreasonable, arbitrary and in violation of the constitutional provisions noted below . . .
>
> 24. The provisions of Ordinance 1744-A are unconstitutional, both as a general matter and applied to the Taxpayer. They deprive taxpayers generally, and in particular the Taxpayer here, of due process of law; . . . in derogation of the federal and Pennsylvania constitutions.

The Court of Common Pleas did not pass upon the issue in its opinion.

Appellant again challenged the adequacy of the notice provisions in the ordinance in its appeal to Commonwealth Court. In a section of its brief entitled "Application of the 60-Day Limit is Unfair and Unconstitutional," appellant argued that the imposition of the 60-day limit for filing an application without notice to the taxpayer was inherently unreasonable and invalid. Specifically, "[a]s applied to this taxpayer, there was no practical chance to gain knowledge of the new requirement in time to make the application. . . ." Appellant's brief requested that the Court cure the obvious unfairness and avoid an "unconstitutional result." The Commonwealth Court did not discuss the constitutionality issue in its opinion. One judge dissented on the ground that the City's procedure did not comply with either the statute or the ordinance.—

Appellant next filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. The petition sought relief based on the invalidity of the 60-day notice provision. The Pennsylvania Supreme Court denied the petition. Appellant then discovered that the City of Philadelphia had reversed its position in an identical case. The Renfrew Center, Inc., ("Renfrew") also constructed an addition to its nursing home. Its architect applied for the building permit and received the same notice pertaining to the exemption. Renfrew applied to the Board of Revision of Taxes for the exemption after the 60-day period had passed, and its application was denied. Renfrew then filed a petition for relief in the Court of Common Pleas. At this point, the City of Philadelphia reversed itself and granted the tax abatement to Renfrew.

Appellant filed an application for reconsideration with the Supreme Court of Pennsylvania to correct the obvious unfairness. The application raised the fact the appellant had been treated differently than another taxpayer in like circumstances — a violation of the Equal Protection Clause of the Fourteenth Amendment. The application was denied on June 26, 1987.

THE QUESTION IS SUBSTANTIAL

The decision in this case conflicts with *United States v. Locke*, 105 S. Ct. 1785 (1985) and *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). These decisions hold that before a state may pass legislation that cuts off an individual's property rights, it must allow the citizen a reasonable opportunity to familiarize himself with its requirements and to comply with them. *Locke*, 105 S. Ct. at 1800; *Texaco*, 454 U.S. at 532. In *Texaco*, a two-year grace period was found to be sufficient. *Id.*, 454 U.S. at 532. In *Locke*, a three-year period was provided. *Id.*, 105 S. Ct. at 1800. Neither of these cases, therefore, required the Court to resolve the issue of how much notice is enough in a given set of circumstances. The ordinance at issue here, however, applies to filings made 10 days before its enactment, contained no grace period, and provided for the extinguishment of rights within 60 days of the date of the permit. It therefore did not permit appellant a reasonable opportunity to discern its existence and to file an application. Because both legislators and businessmen need to know the limits of due process in this area, probable jurisdiction should be noted.

The Due Process Clause guarantees an individual appropriate procedural protection before he may be deprived of property. *See, e.g., Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978). The existence of property thus triggers the constitutional guarantees. Property rights arise from "existing rules or understandings that stem from an independent source such as state law[.]" *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Moreover, for a claimant to possess a protectable property interest, he "must have more than an abstract need or desire for it . . . instead, he must have a legitimate claim of entitlement to it." *Id.*

The property interest claimed by appellant is the exemption from real estate taxation of the addition to its nursing home. The relevant city ordinance provides:

> [P]ersons making improvements to eligible industrial, commercial or other business properties within the definition contained in this ordinance and in any of the foregoing

> eligible areas, may apply for, and the Board of Revision of Taxes may grant, a real estate tax exemption upon such improvements in the amount and in the manner herein provided.

Phila. Code §19-1303(3)(B)(2).

While it appears that an application made under this ordinance is subject to the discretion of the Board of Revision of Taxes, a fuller reading of the ordinance shows otherwise. First, the Philadelphia City Council defined the entire City as a deteriorated area, and a deteriorated property as a business property within a deteriorating area, thus bringing appellant's improvements within these eligibility criteria. *Id.* (B)(1), (C)(1). The definition of an improvement includes the construction of an addition "having the effect of rehabilitating a deteriorated property so that it . . . attains higher standards of . . . economic use." *Id.* (C)(2)(a). The addition constructed by appellant meets these criteria, and there are no other standards for the granting of this exemption.

In these circumstances, appellant's claim to the exemption is a claim of entitlement. The enactment of standards that direct administrative discretion creates a property interest. In *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), for example, the court held that an applicant possessed a property interest where the statute specified the issues to be considered by the City Council in its ruling on a petition. *Id.* at 657. Likewise, in this case the function of the Board of Revision of Taxes is limited to determining whether the application meets the specified criteria. Phila. Code §19-1303(3)(B)(2) ("the Board . . . may grant (an) exemption . . . *in the manner hereinafter provided.*") (emphasis added)

Moreover, this Court has determined that state laws that grant rights of general application create property rights. *See Paul v. Davis*, 424 U.S. 693, 708 (1976) (distinguishing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) on the ground that plaintiff there had a "right to purchase liquor *in common* with the rest of the citizenry.") (emphasis added). *See also Medina v. Rudman*, 545 F.2d 244, 250 (1st Cir. 1976), *cert. denied*, 434

U.S. 891 (1977) (property interest exists if state law confers a "right, upon equal terms with others generally, to be licensed to engage in a common activity or pursuit.") The Pennsylvania Constitution states that any special tax provisions created must be *uniform*. Pa. Const. Art. VIII §2(b)(iii) (emphasis added). Accordingly, the statute permits exemptions for new construction in deteriorated areas to "[a]ny person." 72 P.S. §4727(a). The language confers a right of general application that constitutes a property interest.

This Court enunciated the due process standard for providing notice of legislation that impacts property rights in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). In *Texaco*, this Court considered a due process challenge to an Indiana statute that treated mineral interests as abandoned if not used for 20 years unless the owner filed a statement of claim within the 20 years or a 2-year grace period. *Id.*, 454 U.S. at 518, 519. The Court found that the statute furthered legitimate state goals of encouraging the development of mineral interests and facilitating tax collections. *Id.*, 454 U.S. at 529. The Court then refuted appellants' argument that they were not adequately notified of the statute's requirements. The Court stated that the legislature need only "enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Id.*, 454 U.S. at 532. The Court noted that it would be extremely deferential to the legislative judgment as to the appropriate length of a grace period. *Id.*, 454 U.S. at 532-33. Moreover, property owners are presumed to know of statutes that affect their interest. *Id.*, 454 U.S. at 532. In light of these considerations, the Court found the two-year grace period to be sufficient. *Id.*

United States v. Locke, 105 S. Ct. 1785 (1985), considered a federal statute that required owners of mining interests on federal lands to file notices annually to maintain their interests. *Id.*, 105 S. Ct. at 1789. The statute provided a three-year grace period. Relying on its analysis in *Texaco, supra*, the Court held that the statute did not violate the due process interests of

owners. *Id.*, 105 S. Ct. at 1800.[1]

The facts herein are more favorable for appellant than in either of these cases, and mandate a finding of a due process violation. The ordinance applies to exemptions filed in connection with permits issued 10 days prior to its enactment, and the period for application is limited to 60 days from the date of the permit. It was enacted the day before appellant received its building permit. Although the Board of Revision of Taxes delayed implementation of the 60-day limit until January 1, 1984 and published notice of the change for three (3) consecutive days in December 1983 in the *Legal Intelligencer*, the administrative action does not cure the defect in the statute. In any event, it is irrelevant because the Court of Common Pleas rendered its decision on the petition alone. The lack of a grace period, in combination with a short application period, violates the requirements of due process, especially when it is remembered that the provision at issue is a city ordinance, not a federal or state statute.

Moreover, this is not a case in which the legislature intended a short period of notice. Rather, both the legislature and the City Council intended that taxpayers receive notice of the exemption. The statute provides that the taxpayer shall notify the local taxing authority on a form *provided by it*. 72 P.S. §4727(a) (emphasis added). The ordinance provides that the Department of Licenses & Inspections shall notify the applicant for a permit of the possibility of a tax exemption. Phila. Code §19-1303(D)(3)(a). While indicating a favorable legislative intent, the notice provisions did not operate to provide effective notice. Appellant was not provided a form at the time of filing for the building permit, and the printed notice on the building permit was received by appellant's architect, not appellant.

This Court can clarify the law by noting jurisdiction. Legislators need to know the limits of due process so that they can gauge how quickly an urgently needed remedial statute may

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1. In Atkins v. Parker, 472 U.S. 115 (1985), the court upheld a federal statute that operated to reduce welfare benefits against a due process challenge. The key factors were a 90-day grace period and the mailing of notice to welfare recipients.

be put into effect without violating due process rights. On the other hand, businessmen need reassurance that they do not have to review the enactments of every level of government on an immediate basis to avoid losing interests they rely on.

The last issue for review concerns the City of Philadelphia's decision to permit the Renfrew Center to file its application for tax abatement out of time while denying the same relief to petitioner. Such flagrant lack of evenhandedness in the application of a time limitation constitutes a violation of the Equal Protection clause. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Probable jurisdiction should be noted to correct this error.

CONCLUSION

For all these reasons, this Court should note probable jurisdiction.

DATED: September 24, 1987

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APPENDIX

APPENDIX

NORTHWOOD NURSING CARE AND CONVALESCENT HOME, INC.,	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES,	:	
Appellee	:	No. 1607 C.D. 1985

BEFORE: HONORABLE THEODORE O. ROGERS, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE JACOB KALISH, Senior Judge

ARGUED: April 8, 1986

OPINION BY JUDGE PALLADINO FILED: June 27, 1986

This is an appeal by Northwood Nursing Care and Convalescent Home, Inc. (Appellant) from an order of the Court of Common Pleas of Philadelphia County (trial court) which denied Appellant's petition for leave to file an application for exemption of taxes nunc pro tunc. We affirm.

On June 10, 1983, Appellant's architect applied to the Department of Licenses and Inspections of the City of Philadelphia for a building permit to construct an addition to its nursing care facility located in the City of Philadelphia (City). The building permit was issued on July 12, 1983, and contained the following notice:

> Information for exemption from real estate taxes on improvements to properties may be obtained by contacting the Board of Revision of Taxes, Room 303, City Hall Annex, Philadelphia, PA 19107, MU6-4340.

The notice was placed on the building permit pursuant to Section 19-1303(3) of the Philadelphia Code (§19-1303(3)) which provides:

(3) Procedure for Obtaining Exemption

(a) At the time a building permit for construction of an improvement is applied for, the Department of Licenses and Inspections shall notify the applicant by a printed notice of the possibility of a tax exemption under this bill. Within sixty (60) days of the date the building permit is issued, the taxpayer shall apply to the Board of Revision of Taxes for such exemption. The application shall be in writing and must be filed within the specified time period.

On October 11, 1984, Appellant filed an application for exemption from taxes on the addition to the nursing care facility. The application was denied by the Board of Revision of Taxes (Board) for the City because it had not been filed within the sixty-day period provided by §19-1303(3). Appellant filed a petition for leave to file an application for exemption of taxes nunc pro tunc with the trial court. The trial court denied the petition because it found that the notice printed on the building permit was sufficient to alert Appellant of its rights and, therefore, there was no fraud or breakdown in the operation of the judicial system which would warrant extending the time period for requesting a tax exemption by a petition nunc pro tunc.

Appellant now appeals to this Court asserting that the time limitation imposed by §19-1303(3) is invalid because it is not specifically authorized by the enabling legislation, and that the notice provided by the building permit is insufficient. We find both arguments to be without merit.

The Pennsylvania Constitution, Article VIII, §2(b) (iii) provides:

(b) The General Assembly may, by law:

. . . .

(iii) Establish standards and qualifications by which local taxing authorities may make uniform special tax provisions applicable to a taxpayer for a limited period of time to encourage improvement of deteriorating property or areas by an individual, association or

> corporation, or to encourage industrial development by a non-profit corporation; . . . .

Pursuant to this authorization, the General Assembly has enacted the Local Economic Revitalization Tax Assistance Act, Act of December 1, 1977, P.L. 237, 72 P.S. §4722-4727 (Act). Section 4727 of the Act provides:

> §4727. Procedure for obtaining exemption.
>
> (a) Any person desiring tax exemption pursuant to ordinances or resolutions adopted pursuant to this act, shall notify each local taxing authority granting such exemption in writing on a form provided by its submitted at the time he secures the building permit, or if no building permit or other notification of improvement is required, at the time he commences construction . . . .

Appellant argues that because the Act does not provide for a time limit within which to apply for the exemption, §19-1303(3), which implements the Act, may not limit the time in which a taxpayer must apply for the exemption. We disagree. The Act specifically provides that the taxpayer must notify the local taxing authority of his or her intention to seek an exemption "at the time he secures the building permit." The Philadelphia City Council has interpreted this to mean "within sixty days of [securing] the building permit." This is a reasonable interpretation which is within the authority granted to the City to supplement the enabling legislation. The Act specifically provides that it "shall be construed to authorize local taxing authorities to" provide tax exemptions. 72 P.S. §4723. The plain language of the Act clearly contemplates that whether the exemption will be available and how it is to be obtained is left to the determination of the local taxing authorities.[1]

Appellant next argues that the notice provided by the building permit was insufficient, thereby causing a breakdown in the judicial process which warrants nunc pro tunc relief. This precise argument was considered and rejected by this Court in

Academy Plaza Associates, Ltd. v. Board of Revision of Taxes, City of Philadelphia, Pa. Commonwealth Ct. , 503 A.2d 1101 (1986).[2]

Accordingly, the order of the trial court is affirmed.

/s/

MADALINE PALLADINO, JUDGE

FOOTNOTES

[1] Appellant also argues that Section 19-1303(3) of the Philadelphia Code is contrary to the intent of the Pennsylvania Constitution, Article VIII, §2(b)(iii), because this section of the Constitution does not authorize a tax exemption, which must be strictly construed, but allows for "special tax provisions . . . to encourage improvement of deteriorating property . . . ." Appellant argues that a "special tax provision" is not an exemption and must be broadly rather than strictly construed. We find this argument to be without merit. The "special tax provision" is no more than an exemption which may be enacted by local taxing authorities for a limited period of time. As such, it must be strictly construed as must all tax exemptions. *See Academy Plaza Associates, Ltd. v. Board of Revision of Taxes, City of Philadelphia*, Pa. Commonwealth Ct. , 503 A.2d 1101 (1986).

[2] Appellant, in addition to the arguments raised in *Academy Plaza Associates*, argues that the notice on the building permit is insufficient because the permit was issued to Appellant's architect and not directly to Appellant. Because we conclude that the architect was Appellant's agent and because the permit was publicly posted at Appellant's facility, we find this argument to be without merit.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NORTHWOOD NURSING CARE AND CONVALESCENT HOME, INC., *Appellant* :

v. : No. 1607 C.D. 1985

CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES, *Appellee* :

BEFORE: HONORABLE THEODORE O. ROGERS, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE JACOB KALISH, Senior Judge

Argued: April 8, 1986 — Philadelphia

DISSENTING OPINION BY JUDGE ROGERS FILED: June 27, 1986

This tax exemption case grows out of the Local Economic Revitalization Tax Act (LERTA), Act of December 1, 1977, P.L. 237, 72 P.S. §4722-4727. The purpose of LERTA is to encourage the improvement of deteriorated properties by authorizing local taxing authorities to exempt from local taxes properties whose owners are willing to bear the costs of improvements. The City of Philadelphia on the authority of LERTA, added implementing provisions to the City Code.

Section 6(a) of LERTA, 72 P.S. §4727(a), is entitled "Procedure for Obtaining Exemption" and provides that "Any person desiring tax exemption pursuant to ordinances or resolutions adopted pursuant to this act, shall notify each local taxing authority granting such exemption in writing *on a form provided by it* submitted at the time *he* secures the building permit. . . ." (Emphasis supplied.) Philadelphia Code Section 19-1303(3)(a), a part of the Code provisions implementing LERTA, provides the following procedure: "At the time a building permit for construction or an improvement is applied for the Department of

Licenses and Inspections shall notify the applicant by printed notice of the possibility of a tax exemption under this bill."

As appears by the facts in this case, the procedure actually followed by Philadelphia's Department of Licenses and Inspections was to attach to building permits (we are told in small print) the following notice: "Information for exemption from a real estate tax on improvements to properties may be obtained by contacting the Board of Revision of Taxes. . . ."

I respectfully dissent from the order of the majority upholding the denial of exemption in this case because the City's procedure complies neither with LERTA nor the relevant provision of the City Code.

As we have seen, LERTA requires the local taxing authority to provide the applicant for a permit to improve a deteriorated property with a form upon which he may request the exemption. No such form was provided to the applicant.

The Philadelphia Code provides, as we have also seen, that the Department of Licenses and Inspection "shall notify the applicant" for a building permit at the time of the application "of the possibility of a tax exemption under this bill." The notice provided the taxpayer in this case did not notify the appellant of the possibility of an exemption; it told the appellant only where information for exemption "may be obtained."

Finally, LERTA confers no legislative rule-making power upon the local taxing authority; it grants no rule-making powers whatsoever. Hence, Philadelphia's procedure which so markedly deviates from the procedure established by LERTA, is certainly ineffective.

/s/

THEODORE O. ROGERS, J.

NORTHWOOD NURSING CARE AND CONVALESCENT HOME, INC.,	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES,	:	
Appellee	:	No. 1607 C.D. 1985

ORDER

AND NOW, June 27, 1986, the order of the Court of Common Pleas of Philadelphia County, at No. 4326, March Term 1985, dated May 14, 1985, is affirmed.

/s/
MADALINE PALLADINO, JUDGE

NORTHWOOD NURSING CARE AND CONVALESCENT HOME, INC.	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
vs.	:	CIVIL TRIAL DIVISION
CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES	:	MARCH TERM, 1985 NO. 4326

OPINION

WHITE, J. MAY 14, 1985

Before the Court is a Petition for Leave to File an Application for Exemption of Taxes Nunc Pro Tunc. The petitioner obtained a building permit for construction of a two-story addition to a nursing home on August 10, 1983. In the middle of the permit in small but italicized letters, appeared the following notice:

> Information for exemption from real estate tax on improvement to properties may be obtained by contacting the Board of Revision of Taxes, Room 303, City Hall Annex, Philadelphia, PA 19107, MU6-4340.

This notice appeared pursuant to Councilmanic Ordinance 1130, as amended by Councilmanic Ordinance 1744-A, July, 1983, (Section 19-1303(3) of *The Philadelphia Code*), which reads:

> (3) Procedure for Obtaining Exemption.
>
> (a) At the time a building permit for construction of an improvement is applied for, the Department of Licenses and Inspections, shall notify the applicant by a printed notice of the possibility of tax exemption under this bill. Within sixty (60) days of the date the

> building permit is issued, the taxpayer shall apply to the Board of Revision of Taxes for such exemptions . . .

Petitioner, however, did not phone the Board and did not file its application until October 11, 1984. It was rejected by the Board as untimely.

Statutory provisions exempting property from taxation must be strictly construed. It is the taxpayer's burden to bring himself within the scope of the exemption statute. *In Re Tax Assessment of Greater Erie Economic Development Corp.*, 61 Pa. Commw. 144, 433 A.2d 568 (1981). Part of the scope of the exemption statute is the prompt filing of an application for exemption.

Furthermore, in *Coshey, et al v. Beal*, 27 Pa. Commw. 440, 366 A.2d 1295 (1976), the Commonwealth Court said:

> We also take note of our holdings to the effect that an appeal nunc pro tunc shall not be allowed without a showing of fraud or its equivalent or a breakdown in the operation of the judicial system. *Alger-Rau Associates, Inc. v. General State Authority*, 7 Pa. Cmwlth. 71, 74 298 A.2d 916, 917 (1973); *Yatzer v. Washington Township Commissioners*, 2 Pa. Cmwlth. 614-618, 280 A.2d 130 (1971). A showing of mere hardship is not sufficient. *Philadelphia v. Rohm & Haas Co.*, 5 Pa. Cmwlth. 287, 290, 290 A.2d 428, 431 (1972).

In the case at bar, there is no fraud or breakdown of the system. A phone call pursuant to the printed notice would have given petitioner all the necessary information. Accordingly, the Petition is denied. An appropriate order will be entered.

BY THE COURT:

/s/ _____

_____ J.

NORTHWOOD NURSING CARE AND CONVALESCENT HOME, INC.	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
v.	:	CIVIL TRIAL DIVISION
CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES	:	MARCH TERM, 1985 NO. 4326

ORDER

AND NOW, this 14th day of May, 1985, upon consideration of the Petition for Leave to File Application Nunc Pro Tunc and the response thereto, it is hereby ORDERED that the Petition is denied.

BY THE COURT:

/s/

THOMAS A. WHITE, J.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MARLENE F. LACHMAN, ESQ.
PROTHONOTARY
PATRICK TASSOS
DEPUTY PROTHONOTARY

468 CITY HALL
PHILADELPHIA, PA 19107
(215) 496-4600

February 11, 1987

Joseph C. Bright, Jr., Esquire
DRINKER, BIDDLE & REATH
1100 Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia, PA 19107

RE: *Northwood Nursing Care and Convalescent Home, Inc., Petitioner v. City of Philadelphia, Board of Revision of Taxes*
NO. 669 E.D. ALLOCATUR DOCKET 1986

Dear Mr. Bright:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"January 29, 1987.

Petition Denied

Per Curiam."

Very truly yours,

MARLENE F. LACHMAN, ESQUIRE
Prothonotary

/mz
cc: Joy J. Bernstein, Esquire

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

MARLENE F. LACHMAN, ESQ.
PROTHONOTARY
PATRICK TASSOS
DEPUTY PROTHONOTARY

468 CITY HALL
PHILADELPHIA, PA 19107
(215) 496-4600

June 30, 1987

Joseph C. Bright, Jr., Esquire
DRINKER, BIDDLE & REATH
1100 Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia, PA 19107

RE: *Northwood Nursing Care and Convalescent Home, Inc., Petitioner v. City of Philadelphia, Board of Revision of Taxes*
NO. 669 E.D. ALLOCATUR DOCKET 1986

Dear Mr. Bright:

This is to advise you that the following Order has been endorsed on your Application for Reconsideration of Petition for Allowance of Appeal, filed in the above captioned matter:

"June 26, 1987.

Petition Denied.

Per Curiam."

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

/mz
cc: Joy J. Bernstein, Esquire

IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

NORTHWOOD NURSING and CONVALESCENT HOME, INC., *Appellant*,	:	
v.	:	No. 1607 C.D. 1985
CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES, *Appellee*.	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Northwood Nursing and Convalescent Home, Inc., the appellant herein, appeals to the Supreme Court of the United States from the final judgment of the Commonwealth Court of Pennsylvania, affirming the denial of Appellant's petition for leave to file an application for exemption from taxes nunc pro tunc, entered on June 27, 1986.

The appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/

Joseph C. Bright, Jr.
Joseph D. Olivieri
DRINKER BIDDLE & REATH
1100 PNB Building
Broad and Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700

Filed: Sep. 18, 1987
Commonwealth Court of Pennsylvania
Supreme Court of Pennsylvania

No.

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1987

NORTHWOOD NURSING AND
CONVALESCENT HOME, INC.,

Appellant

v.

CITY OF PHILADELPHIA,
BOARD OF REVISION OF TAXES,

Appellee

ON APPEAL FROM THE
COMMONWEALTH COURT OF PENNSYLVANIA

AFFIDAVIT OF SERVICE

I, Joseph D. Olivieri, hereby certify that on September 18, 1987, I served the foregoing Notice of Appeal upon all parties required to be served as follows:

By First Class Mail:

Joy J. Bernstein
Assistant City Solicitor
15th Floor
Municipal Services Building
Philadelphia, PA 19102

Attorney for Appellee
City of Philadelphia
Board of Revision of Taxes

/s/
Joseph D. Olivieri

DARSCHELLE A. RYLANDER
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 18, 1989
Sworn to and subscribed before me
this 18th day of September 1987

U.S. Constitution, Amendment XIV, §1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsylvania Constitution
Art. VIII, §2(b)(iii)

The General Assembly may, by law:

Establish standards and qualifications by which local taxing authorities may make uniform special tax provisions applicable to a taxpayer for a limited period of time to encourage improvement of deteriorating property or areas by an individual, association or corporation, or to encourage industrial development by a non-profit corporation; and

72 P.S. §4722 *et seq.*

LOCAL ECONOMIC REVITALIZATION TAX ASSISTANCE ACT

§4722. Short title

This act shall be known and may be cited as the "Local Economic Revitalization Tax Assistance Act."

§4723. Construction

This act shall be construed to authorize local taxing authorities to exempt improvements to certain deteriorated industrial, commercial and other business property thereby implementing Article VIII, section 2(b)(iii) of the Constitution of Pennsylvania.

§4724. Definitions

The following words and phrases when used in this act shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"**Deteriorated property.**" Any industrial, commercial or other business property owned by an individual, association or corporation, and located in a deteriorating area, as hereinafter provided, or any such property which has been the subject of a order by a government agency requiring the unit to be vacated, condemned or demolished by reason of noncompliance with laws, ordinance or regulations.

"**Improvement.**" Repair, construction or reconstruction, including alterations and additions, having the effect of rehabilitating a deteriorated property so that it becomes habitable or attains higher standards of safety, health, economic use or amenity, or is brought into compliance with laws, ordinances or regulations governing such standards. Ordinary upkeep and maintenance shall not be deemed an improvement.

"**Local taxing authority.**" A county, city, borough, incorporated town, township, institution district or school district having authority to levy real property taxes.

"**Municipal governing body.**" A city, borough, incorporated town or township.

§4725. Deteriorated areas

(a) Each local taxing authority may by ordinance or resolution exempt from real property taxation the assessed valuation of improvements to deteriorated properties in the amounts and in accordance with the provisions and limitations hereinafter set forth. Prior to the adoption of the ordinance or resolution authorizing the granting of tax exemptions, the municipal governing body shall affix the boundaries of a deteriorated area or areas, wholly or partially located within its jurisdiction, if any. At least one public hearing shall be held by the municipal governing body for the purpose of determining said boundaries. At the public hearing the local taxing authorities, planning commission or redevelopment authority and other public and private agencies and individuals, knowledgeable and interested in the improvement of deteriorated areas, shall present their recommendations concerning the location of boundaries of a deteriorated area or areas for the guidance of the municipal governing

bodies, such recommendations taking into account the criteria set forth in the act of May 24, 1945 (P.L. 991, No. 385), known as the "Urban Redevelopment Law," for the determination of "blighted areas," and the criteria set forth in the act of November 29, 1967 (P.L. 636, No. 292), known as the "Neighborhood Assistance Act," for the determination of "impoverished areas," and the following criteria: unsafe, unsanitary and overcrowded buildings; vacant, overgrown and unsightly lots of ground; a disproportionate number of tax delinquent properties, excessive land coverage, defective design or arrangement of buildings, street or lot layouts; economically and socially undesirable land uses. The ordinance or resolution shall specify a description of each such area as determined by the municipal governing body, as well as the cost of improvements per unit to be exempted, and the schedule of taxes exempted as hereinafter provided.

(b) Two or more municipal governing bodies may join together for the purposes of determining the boundaries of a deteriorated area and to establish the uniform maximum cost per unit, and such municipal governing bodies shall cooperate fully with each other for the purposes of implementing this act. The local taxing authorities may by implementing ordinance or resolution agree to adopt tax exemptions contingent upon the similar adoption by an adjacent local taxing authority or by a local taxing authority with mutual jurisdiction, within the limitations provided herein.

§4726. Exemption schedule

(a) A local taxing authority granting a tax exemption pursuant to the provisions of this act may provide for tax exemption on the assessment attributable to the actual cost of improvements or up to any maximum cost uniformly established by the municipal governing body. Such maximum cost shall uniformly apply to all eligible deteriorated property within the local taxing authority jurisdiction.

(b) Whether or not the assessment eligible for exemption is based upon actual cost or a maximum cost, the actual amount of taxes exempted shall be in accordance with the schedule of taxes

exempted established by a local taxing authority subject to the following limitations:

(1) The length of the schedule of taxes exempted shall not exceed ten years.

(2) The schedule of taxes exempted shall stipulate the portion of improvements to be exempted each year.

(3) The exemption from taxes shall be limited to the additional assessment valuation attributable to the actual cost of improvements to deteriorated property or not in excess of the maximum cost per unit established by a municipal governing body.

(c) The exemption from taxes authorized by this act shall be upon the property exempted and shall not terminate upon the sale or exchange of the property.

§4727. Procedure for obtaining exemption

(a) Any person desiring tax exemption pursuant to ordinances or resolutions adopted pursuant to this act, shall notify each local taxing authority granting such exemption in writing on a form provided by it submitted at the time he secures the building permit, or if no building permit or other notification of improvements is required, at the time he commences construction. A copy of the exemption request shall be forwarded to the board of assessment and revision of taxes or other appropriate assessment agency. The assessment agency shall, after completion of the improvement, assess separately the improvement and calculate the amounts of the assessment eligible for tax exemption in accordance with the limits established by the local taxing authorities and notify the taxpayer and the local taxing authorities of the reassessment and the amounts eligible for the exemption may be taken by the taxpayer or the local taxing authorities as provided by law.

(b) The cost of improvements to be exempted and the schedule of taxes exempted existing at the time of the initial request for tax exemption shall be applicable to that exemption

request, and subsequent amendment to the ordinance, if any, shall not apply to requests initiated prior to their adoption.

Bill No. 1130

AN ORDINANCE

Amending Title 19 of The Philadelphia Code, relating to finance, taxes and collections, by adding a new section authorizing the Board of Revision of Taxes, on behalf of the City of Philadelphia, to exempt from real estate taxes, improvements to certain deteriorated industrial, commercial or other business property, under certain terms and conditions. The Council of the City of Philadelphia hereby ordains:

SECTION 1. Title 19 of The Philadelphia Code, relating to finance, taxes and collections, is amended by adding a new section to read as follows:

§1303 (3) AUTHORIZATION TO OFFER EXEMPTIONS FROM REAL ESTATE ON IMPROVEMENTS TO DETERIORATED INDUSTRIAL, COMMERCIAL OR OTHER BUSINESS PROPERTIES

A. Legislative Findings

1. The Council finds that:

a. Act 76 of 1977 passed by General Assembly authorizes local taxing authorities to exempt certain deteriorating industrial, commercial and other business property improvements from taxation under certain terms and conditions.

b. There are deteriorated industrial, commercial and other business buildings in all wards of the City.

c. A public hearing, as required by Act 76, has been held regarding the boundaries of the areas containing deteriorated industrial, commercial and other business properties.

B. Eligible Areas

1. The Council determines that all the wards of the City contain "deteriorated areas" as defined in Act 76 of 1977 and are eligible for tax exemption under the Act.

2. Therefore, persons making improvements to eligible industrial, commercial or other business properties within the definition contained in this ordinance and in any of the foregoing eligible areas, may apply for, and the Board of Revision of Taxes may grant, a real estate tax exemption upon such improvements in the amount and in the manner hereinafter provided.

C. In this section, the following definitions shall apply:

1. Deteriorated property.

a. Any industrial, commercial or other business property located in an eligible deteriorated area.

2. Improvement.

a. Repair, construction or reconstruction, including alterations and additions having the effect of rehabilitating a deteriorated property so that it becomes habitable or attains higher standards of safety, health, economic use or amenity or is brought into compliance with laws, ordinances or regulations governing such standards. Ordinary upkeep and maintenance shall not be deemed an improvement.

D. Exemptions.

1. Exemption Amount.

a. The amount to be exempted from real estate taxes shall be limited to that portion of the additional assessment attributable to the actual cost of improvements.

b. The exemption from real estate taxes shall be limited to that improvement for which an exemption has been requested in the manner set forth below, and

for which a separate assessment has been made by the Board of Revision of Taxes.

2. Exemption Schedule.

a. The assessable amount of the improvement costs shall be exempted from real estate taxes for the five (5) tax years immediately following the date upon which the improvement becomes assessable. After the fifth year, the exemption shall terminate.

b. The exemption from taxes granted under this ordinance shall be upon the property and shall not terminate upon the sale or exchange of the property.

3. Procedure for Obtaining Exemption.

a. At the time a building permit for the construction of an improvement is applied for, the Department of Licenses and Inspections shall notify the applicant by a printed notice of the possibility of a tax exemption under this bill. When the building permit is issued, the taxpayer shall apply to the Board of Revision of Taxes for such exemptions. The application shall be in writing upon forms prescribed by the Board of Revision of Taxes.

b. The Board of Revision of Taxes shall determine whether the exemption shall be granted. A copy of the approved request for exemption shall be forwarded by the Board of Revision of Taxes to the taxpayer.

c. Upon completion of the improvement, the taxpayer shall notify the Board of Revision of Taxes, so that the Board may assess the improvements separately for the purpose of calculating the amount of assessment eligible for exemption.

d. The Board of Revision of Taxes shall notify the taxpayer of the amount of assessment eligible for exemption.

e. Appeals from the re-assessment and the amount eligible for the exemption may be taken by the City or by the taxpayer as provided by law.

Approved the eighth day of February, A.D. 1978.

FRANK L. RIZZO,

Mayor of Philadelphia.

Phila. Code §1303(3). Authorization to Offer Exemptions from Real Estate Taxes on Improvements to Deteriorated Industrial, Commercial or Other Business Properties.

A. Legislative Findings.

(1) The Council finds that:

(a) Act 76 of 1977 passed by the General Assembly authorizes local taxing authorities to exempt certain deteriorating industrial, commercial and other business property improvements from taxation under certain terms and conditions.

(b) There are deteriorated industrial, commercial and other business buildings in all wards of the City.

(c) A public hearing, as required by Act 76, has been held regarding the boundaries of the areas containing deteriorated industrial, commercial and other business properties.

B. Eligible Areas.

(1) The Council determines that all the wards of the City contain "deteriorated areas" as defined in Act 76 of 1977 and are eligible for tax exemption under the Act.

(2) Therefore, persons making improvements to eligible industrial, commercial or other business properties within the definition contained in this ordinance and in any of the foregoing eligible areas, may apply for, and the Board of Revision of Taxes may grant, a real estate tax exemption upon such improvements in the amount and in the manner hereinafter provided.

C. In this section, the following definitions shall apply:

(1) Deteriorated property.

(a) Any industrial, commercial or other business property located in an eligible deteriorating area.

(2) Improvements.

(a) Repair, construction or reconstruction, including alterations and additions, having the effect of rehabilitating a deteriorated property so that it becomes habitable or attains higher standards of safety, health, economic use or amenity or it brought into compliance with laws, ordinances or regulations governing such standards. Ordinary upkeep and maintenance shall not be deemed an improvement.

D. Exemptions.

(1) Exemption amount.

(a) The amount to be exempted from real estate taxes shall be limited to that portion of the additional assessment attributable to the actual cost of improvements.

(b) The exemption from real estate taxes shall be limited to that improvement for which an exemption has been requested in the manner set forth below, and for which a separate assessment has been made by the Board of Revision of Taxes.

(2) Exemption schedule.

(a) The assessable amount of the improvement costs shall be exempted from real estate taxes for the five (5) tax years immediately following the date upon which the improvement becomes assessable. After the fifth year, the exemption shall terminate.

(b) The exemption from taxes granted under this ordinance shall be upon the property and shall not terminate upon the sale or exchange of the property.

(3) Procedure for obtaining exemption.

(a) At the time a building permit for the construction of an improvement is applied for, the Department of Licenses and Inspection shall notify the applicant by

a printed notice of the possibility of a tax exemption under this bill. When the building permit is issued, the taxpayer shall apply to the Board of Revision of Taxes for such exemption. The application shall be in writing upon forms prescribed by the Board of Revision of Taxes.

(b) The Board of Revision of Taxes shall determine whether the exemption shall be granted. A copy of the approved request for exemption shall be forwarded by the Board of Revision of Taxes to the taxpayer.

(c) Upon completion of the improvement, the taxpayer shall notify the Board of Revision of Taxes, so that the Board may assess the improvements separately for the purpose of calculating the amount of assessment eligible for exemption.

(d) The Board of Revision of Taxes shall notify the taxpayer of the amount of assessment eligible for exemption.

(e) Appeals from the re-assessment and the amount eligible for the exemption may be taken by the City or by the taxpayer as provided by law.

Bill No. 1744-A

AN ORDINANCE

[Brackets] indicate matter deleted.
Underline indicates new matter added.

Amending Section 19-1303(3) of The Philadelphia Code, relating to real estate tax exemptions on improvement to deteriorated industrial, commercial or other business properties by disqualifying properties used for residential purposes from the exemption; and, further, by altering the terms and conditions of grants of exemptions and continuations of exemptions; all under certain terms and conditions. The Council of the City of Philadelphia hereby ordains:

SECTION 1. Section 19-1303(3) of The Philadelphia Code, relating to real estate tax exemptions on improvements to deteriorated industrial, commercial or other business properties, is hereby amended to read as follows:

§19-1303(3) Authorization to Offer Exemptions from Real Estate Taxes on Improvements to Deteriorated Industrial, Commercial or Other Business Properties.

B. Eligible Areas.

(2) Therefore, persons making improvements to eligible industrial, commercial or other business properties within the definition contained in this ordinance and in any of the foregoing eligible areas, may apply for, and the Board of Revision of Taxes may grant, a real estate tax exemption upon such improvements in the amount and in the manner hereinafter provided.

C. In this section, the following definitions shall apply:

(1) Deteriorated property.

(a) Any industrial, commercial or other business property in an eligible deteriorating area.

D. Exemptions.

(2) Exemption Schedule.

(a) The assessable amount of the improvement costs shall be exempted from real estate taxes for [the] five (5) [tax] years. [immediately following the date upon which the improvement becomes accessible.] The exemption shall commence in the tax year immediately following the year in which the building permit is issued. After the fifth year, the exemption shall terminate.

(3) Procedure for Obtaining Exemption.

(a) At the time a building permit for the construction of an improvement is applied for, the Department of Licenses and Inspection shall notify the applicant by a printed notice of the possibility of a tax exemption under this bill. [When] Within sixty (60) days of the date the building permit is issued, the taxpayer shall apply to the Board of Revision of Taxes for such exemption. The application shall be in writing upon forms prescribed by the Board of Revision of Taxes and must be filed within the specified time period.

(c) [Upon completion of the improvement, the taxpayer shall notify the Board of Revision of Taxes, so that the Board may assess the improvements separately for the purpose of calculating the amount of assessment eligible for exemption.] The Board of Revision of Taxes shall, after it has determined that the improvement is completed, assess separately the improvement and calculate the amounts of assessment eligible for exemption in accordance with the exemption schedule in paragraph (2)(a) above.

(4) Continuation of tax exemption; termination of tax exemption.

(a) The tax exemption granted by the Board of Revision of Taxes shall continue in accordance with this Section, provided that the applicant files an annual certificate of continuing use stating that the property continues to be used for industrial or commercial

purposes justifying the granting of the tax exemption. The certificate of continuing use shall be filed with the Board on such forms and containing such information as shall be prescribed by it. The Board shall have authority to terminate a tax exemption on the failure of an applicant to file an annual certificate of continuing use or on its own determination that the property has ceased to be used for industrial or commercial purposes justifying the granting of an exemption.

(.1) Any person granted a tax exemption prior to July 1, 1983 shall be subject to the requirement of filing an annual certificate of continuing use as provided above. However, any tax exemption granted prior to said date shall not be terminated provided that the use, for which the exemption was granted, continues.

Section 2. The provisions of this ordinance shall apply to exemption granted or denied based on applications submitted in accordance with §19-1303(3) D. (3)(a) after July 1, 1983.

Supreme Court, U.S.
FILED
NOV 19 1987
JO ... JR.
CLERK

No. 87-661

In the Supreme Court of the United States

OCTOBER TERM, 1987

NORTHWOOD NURSING AND CONVALESCENT HOME, INC.,

Appellant

v.

CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES,

Appellee

On Appeal From The Commonwealth Court Of Pennsylvania

MOTION TO DISMISS AND FOR DAMAGES

HANDSEL B. MINYARD
City Solicitor
Counsel of Record

CARL OXHOLM III
Divisional Deputy City Solicitor
1580 Municipal Services Building
Philadelphia, PA 19102-1692

(215) 686-5226

Counsel for Appellee

No. 87-661

In the Supreme Court of the United States

OCTOBER TERM, 1987

MOTION TO DISMISS AND FOR DAMAGES

Pursuant to Supreme Court Rule 16.1(b), appellee City of Philadelphia, Board of Revision of Taxes hereby moves to dismiss this appeal on the grounds that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on, and that the appeal does not present a substantial federal question. Further, Appellee moves this Honorable Court to award it damages for the filing of a frivolous appeal, pursuant to Supreme Court Rule 49.2. In support of this motion, Appellee avers as follows:

1. Appellant seeks to present two questions to this Honorable Court: (1) whether an Ordinance of the City of Philadelphia placing a 60-day limit on applications for real estate tax exemptions "violates the Due Process Clause," and (2) whether the settlement of unrelated litigation involving the same Ordinance "violates the Equal Protection Clause." Neither issue was ever presented to the Philadelphia Court of Common Pleas, the Commonwealth Court of Pennsylvania, or the Pennsylvania Supreme Court.

2. In its "Statement of Questions Involved" in its brief on the merits in the Commonwealth Court of Pennsylvania, Appellant raised two questions, only one of which involved a constitutional challenge. That question read as follows:

1. Whether the Court of Common Pleas erred in

> failing to strike as invalid the provisions of Phila. Code §19-1303(3) that are inconsistent with the statutory directives of section 6 of the Local Economic Revitalization Tax Assistance Act, 72 P.S. §4727 and the constitutional intent expressed in Article VIII, §2 of the Pennsylvania Constitution.

Appellant raised no issue under the federal constitution, and it made no challenge whatsoever to the legality of the 60-day provision.

3. In its "Statement of Questions Involved" in its Petition to the Supreme Court of Pennsylvania, Appellant raised two questions, only one of which involved a constitutional challenge. That question read as follows:

> 1. Whether the Commonwealth Court erred in failing to hold invalid the 60-day time period for filing for an abatement of taxes provided by Philadelphia Code §19-1303(3), either on the grounds that the time limit is not authorized by the Local Economic Revitalization Tax Assistance Act, 72 P.S. §§4722-27, or on the grounds that it is inconsistent with the intent of Article VIII, §2(b)(iii) of the Pennsylvania Constitution.

Appellant raised no issue under the federal constitution.

4. In its "Application for Reconsideration of Petition for Allowance of Appeal" filed in the Supreme Court of Pennsylvania, in which its sole argument was that Appellee had settled unrelated litigation involving the same Ordinance, Appellant made no reference whatsoever either to the federal constitution or to the "equal protection" argument it now wishes to make.

5. Since the constitutional questions now sought to be raised by Appellant were neither presented to nor resolved by the state appellate courts, this Honorable Court is without power to consider those questions. *See, e.g., Street v. New York*, 394 U.S. 576, 581-582 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *Chicago, Indianapolis & Louisville Railway Co. v. McGuire*, 196 U.S. 128, 131-133 (1905).

6. In its "Jurisdictional Statement" filed in this Court, Appellant improperly represents that it did raise the federal

constitutional issues in the state courts. That representation is wholly without justification in the record and warrants the imposition of damages under Supreme Court Rule 49.2.

7. As presented in the state courts, the legal issue raised by Appellant was whether the notice it received of the opportunity to apply for the tax exemption was adequate under state law. Both the Philadelphia Court of Common Pleas and the Commonwealth Court held that the notice was adequate.

8. As presented in this Honorable Court, the issue is whether the 60-day limitation period enacted by ordinance of the City of Philadelphia violated Appellant's right to due process of law. Appellant makes no claim that the Ordinance was improperly introduced into City Council, improperly advertised, improperly considered, improperly passed, or improperly signed into law by the Mayor. There is therefore no basis on which this Court could conclude that the legislative process followed by the City was either inappropriate or in derogation of Appellant's claimed rights.

9. Finally, as Appellant admits, (1) the ordinance at issue became law on July 11, 1983 (Jurisdictional Statement at 3); (2) the notice of exemption was given to Appellant on July 12, 1983 *(id.)*; (3) "the Board of Revision of Taxes delayed implementation of the 60-day limit until January 1, 1984 and published noticed of the change for three (3) consecutive days in December 1983" (*id.* at 9); and (4) Appellant did nothing for ten more months, until it filed for the exemption on October 11, 1984 (*id.* at 4). Since Appellant waited more than fifteen months to file for the exemption, its interest in the 60-day limitation is academic at best, and the issue for this Court is hypothetical. Moreover, as the trial court and appellate court both concluded, "had [Appellant] simply contacted the Board of Revision of Taxes, it would have been adequately informed of the necessary information."

10. There is, therefore, no substantial federal question presented by this appeal.

For all of these reasons, this Honorable Court should dismiss this appeal and award damages against Appellant pursuant to Supreme Court Rule 49.2. Those damages should include reproduction costs and counsel fees.

No. 87-661

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

NORTHWOOD NURSING AND CONVALESCENT HOME, INC.,
Appellant

v.

CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES,
Appellee

ON APPEAL FROM THE
COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS AND FOR DAMAGES

Joseph C. Bright, Jr.
Counsel of Record
Joseph D. Olivieri
DRINKER BIDDLE & REATH
1100 PNB Building
Broad and Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700
Counsel for Appellant

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

No. 87-661

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

NORTHWOOD NURSING AND CONVALESCENT HOME, INC.,
Appellant

v.

CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES,
Appellee

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS AND FOR DAMAGES

Appellant Northwood Nursing and Convalescent Home, Inc. moves to strike appellee's Motion to Dismiss and for Damages because this Motion was not timely filed. Supreme Court Rule 16.1 states that appellee must file a Motion to Dismiss within thirty (30) days of appellee's receipt of the jurisdictional statement, unless the time for filing is extended. Appellant's jurisdictional statement was mailed to appellee on September 24, 1987, but appellee's Motion was not filed until November 18, 1987, beyond the time specified. Appellant further moves to strike appellee's Motion for Damages because Rule 16.1 specifies that no pleading may be joined with a Motion to Dismiss other than a Motion to Affirm. Appellee's objections

concerning the raising of a federal question are met at pages four and five of the jurisdictional statement, and, thus, these issues will not be reargued here.

Joseph C. Bright, Jr.
Joseph D. Olivieri
DRINKER BIDDLE & REATH
1100 PNB Building
Broad and Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700

DATED: November 24, 1987